88-1691

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1988

STERLING DRUG INC.,

Petitioner,

v.

CIRCUIT COURT FOR MILWAUKEE, THE HONORABLE GARY A. GERLACH, JUDGE, PRESIDING, JACQUELINE FOX, A MINOR, BY HER GUARDIAN AD LITEM, ROBERT L. HABUSH, GARY FOX, AND JUDITH FOX,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN OR, ALTERNATIVELY, FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Does a corporation, through its employees and agents, have a right to due process and a first amendment right to due process and a first amendment right to associate and speak freely with other members of the same trade association, and with its own employees, attorneys, and selected expert consultants without fear that those communications will be turned over to its legal adversary?

2. Does the trial court violate defendant's right to due process of law by allowing discovery of communications and documents relating to a corporation's investigation and assessment of potential civil and regulatory litigation, denying defendant the protection of the attorney/client and work product privileges?

3. Does the trial court violate defendant's right to due process of law in ruling that documents which are indisputably privileged in one action are suddenly bereft of protection from discovery in a second action involving the same product, type of injury, and defenses, merely because the first action has been resolved?

4. Does the a court violate defendant's first amendment rights to petition the federal government and to free speech by allowing discovery of communications and documents which are not in the public domain, and which relate to petitioning activities, especially where the government has a compelling interest in preservation of frank and unfettered nature of such activities?

Petitioner submits that all the above questions must be answered affirmative. Otherwise, this Court would sanction discrimination against and denial of constitutional protections to a selected class of legal entities, based solely upon corporate status and perceived wealth.

LIST OF PARTIES

The parties to these proceedings are petitioner, defendant Sterling Drug Inc., and respondents, plaintiffs Jacqueline Fox (by her guardian ad litem, Robert L. Habush), Gary Fox, and Judith Fox. Other named defendants in the trial court are ABC Insurance Company (a fictitious corporation), Red Cross Pharmacy, Inc. (a Wisconsin corporation), and DEF Insurance Company (a fictitious corporation).

On appeal, the trial judge, the Hon. Gary A. Gerlach, was named as a party, since his order was challenged through a petition for a supervisory writ in both the court of appeals and supreme court by this petitioner and/or the Aspirin Foundation of America.

The Aspirin Foundation of America ("AFA" or "Foundation") was not named as a defendant by respondents/plaintiffs, but sought and received leave to intervene for the first time in the court of appeals. In the Wisconsin Supreme Court, the Foundation filed a petition for review.

RULE 28.1 LIST

Pursuant to Rule 28.1, the parent companies, affiliates and subsidiaries, excluding wholly owned subsidiaries, of petitioner Sterling Drug Inc. are:

Eastman Kodak Company,
Sterling Products Indonesia
Yamanouchi Pharmaceutical, Inc.
Dainhiseika Sterling Co. Ltd.,

Imrock Chemical Co. Ltd.,
Sterling Products Limited (Ghana)
Sterling Drugs Korea Ltd.
Sterling Products Nigeria Ltd.
Sterling Pakistan Private Ltd.
Mackwoods-Winthrop Limited
Miller Bros. Limited
Hall & Company Limited
Photofinishers (Glasgow) Limited
Reflex Photo Works Limited
Roll Film Company Limited
Taylors Dev. & Printing Works Limited
Pinnacle Systems Inc.
Wilson & George Meyer
Stuart Photo Services Limited
Consumer Developments Limited
City Photo Limited
Ordinant S.A.R.L.
Verbatim Commercial Limited
Data Technology Corporation
Sun Microsystems, Inc.
Chinon Industries Inc.
Cytogen Inc.
Carizon Inc.
Oryx
NeoRx Corporation
Nippon Systems
Enzon Inc.
Imagica
Genencor Inc.
Imunex Inc.
Seaga
Qualex Inc.

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OPINIONS BELOW

The opinion of the Wisconsin Circuit Court has not been reported. The order is reprinted in the appendix to this petition, at pages A-20 through A-23. The order of the Wisconsin Court of Appeals denying leave to appeal is reprinted in the appendix, at pages A-24 through A-27. The order of the Wisconsin Supreme Court denying the supervisory writ is reprinted in the appendix, at pages A-28 through A-30.

JURISDICTION

This case involves review of a state court discovery order entered by the trial court on November 10, 1988 (App. A20-A23). Petitioner timely sought leave to appeal to the Wisconsin Court of Appeals. Leave was denied by an order dated and amended on December 14, 1988. (App. A24-A27.) A petition for supervisory writ was filed with the Wisconsin Supreme Court. This petition was denied on February 1, 1989 (App. A28-A30).

This Court has jurisdiction over all final judgments rendered by a state court, as provided in 28 U.S.C. §1257. Jurisdiction in this case, which involves review of a state court discovery order requiring production of certain documents, is found in this Court's holding in *Perlman v. U.S.*, 247 U.S. 7 (1918), and the collateral order doctrine. Petitioner also relies on 28 U.S.C. §1651 as an aid to this Court's jurisdiction.

The trial court was in possession of the documents at the time it ordered them produced.[1] Although discovery orders are generally reviewed on appeal from a contempt judgment resulting from a failure to comply with the discovery order (*Alexander v. United States*, 201 U.S. 117, 121-22 (1905)), an exception arises where, as here, the trial court has possession of the documents and the party is "powerless to avert the mischief of the order" (*Perlman v. United States*, 247 U.S. 7, 13, 38

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[1] The court had ordered, at the time the documents were given to it for *in camera* review, that any production would be by defendant at defense counsel's office. Therefore, the court led defendant to believe that the documents would be returned to defendant before any actual production. Unfortunately, the court, itself, later produced the documents to plaintiffs.

S.Ct. 417 (1918), cited with approval in *United States v. Ryan*, 402 U.S. 530, 532-33 (1971). The requirement that a party must be held in contempt before an order to produce is appealable is not absolute, as this Court recently recognized. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 52, n. 8 (1987).

This Court also has jurisdiction under the collateral order doctrine. This doctrine recognizes that the finality requirement has a practical, and not technical, construction. *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 478, n.7 (1975). The requirement of finality found in 28 U.S.C. § 1257 "should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 52 (1987). In this case, if this Court does not take jurisdiction and review the order to produce documents, then petitioner will be irreparably harmed, since the documents, to the extent disclosed, will have lost their confidential status. *Perlman v. United States*, 247 U.S. 7, 12-13, 38 S.Ct. 417 (1918); *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 51-52 (1987).

The policy considerations underlying the collateral order doctrine fit this case. Federal questions have been conclusively and erroneously decided by a state court. Those questions concern not only whether documents should have been produced to plaintiffs, but also whether those documents must now be excluded from use in further discovery and from use at trial. Furthermore, once plaintiff's counsel has viewed privileged documents, one "cannot unring the bell" by use of a later appeal.

Therefore, such production continues to affect all aspects of this case as it proceeds to judgment.

Finally, production of documents in this case does not moot the question, as it might in other ordinary cases. The case at bar is but one of a group of cases in various jurisdictions throughout the country dealing with same product, the same manufacturer, similar alleged injuries and "defects," and similar issues at law. Production of the same documents is sought in other cases with plaintiffs and defendants utilizing the same arguments set forth in this matter. (See also footnote 2, *infra*). Therefore, allowing discovery in this case could very well result in discovery in other cases to the continuing and future detriment of defendant.

This Court should formally recognize that the character of national litigation is such that, while consisting of different cases, those cases are not entirely independent in all ways. Events—including discovery—in one action necessarily and inevitably affect the others. Therefore, unlike standard individual cases, discovery in one suit does not moot the issue, since it continues to have repeated and widespread effect. This Court, therefore, should take a "pragmatic approach" to the finality requirement and accept review. 94 L.Ed 2d at 52-53, n. 8.

This Court should also take jurisdiction because petitioner's first amendment rights will be forever lost. Where a constitutional issue will not survive for this Court's review, there is jurisdiction over a collateral, non-final order. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 51 (1987), citing *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975).

Petitioner also relies on 28 U.S.C. §1651 as an aid to this Court's jurisdiction. Where the appeal may be mooted unless a stay is entered, an extraordinary writ may be issued "in aid of this Court's appellate jurisdiction." *Renaissance Arcade v. County of Cook*, 473 U.S. 1322, 1323 (1985). In this case, because petitioners are requesting a declaration that the documents are absolutely privileged and that no use or communication of them or their substance be allowed in this or any other case, an extraordinary writ lies. See *Kerr v. United States*, 426 U.S. 394, 404 (1976). This case presents exceptional circumstances. Adequate relief cannot be obtained from any other court. Sup. Ct. R. 26.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257. State courts' certiorari.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under

the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the Wisconsin Circuit Court, entered in the above-entitled proceeding on November 10, 1988, review of which was denied by the Wisconsin Supreme Court on February 1, 1989. In the alternative, petitioner prays that an extraordinary writ issue pursuant to 28 U.S.C. §1651.

STATEMENT OF THE CASE

Background and Procedural History of This Case.

In the November 7, 1980, issue of the Morbidity and Mortality Weekly Report ("MMWR"), the Centers for Disease Control ("CDC") reported that there were two state surveys showing an association between the ingestion of aspirin and Reye's syndrome.

This report and the studies were considered controversial by petitioner, the manufacturer of Bayer Aspirin. Petitioner knew it was "a near inevitability" that the Food and Drug Administration ("FDA"), after reviewing the report, would commence regulatory action. In addition, petitioner felt it faced immediate potential civil product liability actions (App. A67). At the direction of petitioner's attorney, an investigation and assessment of the studies was commenced (App. A67). Petitioner

also retained outside counsel, including the firm of Covington and Burling, to represent it on legal aspects of the claimed relation between Reye's Syndrome and aspirin (App. A67).

During the investigation and development of information in relation to Reye's syndrome, attorneys for petitioner communicated with corporate employees and with outside counsel. Outside consultants were retained and studies were undertaken at the direction of counsel. Meetings were held with corporate employees and attorneys to respond to anticipated or pending regulatory action and civil litigation (App. A68-A69).

As anticipated by petitioner, litigation did commence after publication of the MMWR. In early 1982, the FDA commenced a regulatory administrative proceeding to determine whether there should be labels on aspirin regarding Reye's Syndrome (App. A36). On May 17, 1982, civil suit was instituted by the Public Citizen Health Research Group ("HRG") to seek a court order finding that aspirin was misbranded and mandating that the FDA require labelling on aspirin (A36, A86-A87). The AFA intervened in this suit, *Public Citizen Health Research Group, et al. v. Hayes*, No. 82-1346 (D.C. Dist.), in March, 1983 (App. A87).

Suit Instituted by Respondent

On December 5, 1985, respondents sued petitioner for personal injuries on product liability theories, claiming that the minor contracted Reye's Syndrome as a result of taking Bayer Aspirin, petitioner's product. During litigation, respondents demanded production of documents in Sterling's possession relating to the

relationship between aspirin and Reye's Syndrome. The demand was virtually without limitation, including all documents or communications to the FDA (regard less of whether such communications related to regulatory action against Sterling), and all documents regarding meetings of Sterling employees and agents as to Reye's Syndrome (regard less of whether the meetings were with Sterling attorneys or in the course of a legal investigation). (App. A1-A7.)

Sterling produced seven boxes containing thousands of documents in response to plaintiffs' request (Plaintiffs' Brief in Support of Motion for Contempt Order and Motion to Compel Discovery, dated 6/9/88, at p. 3). However, Sterling asserted that 1,026 documents, all of which postdated publication of the November 7, 1980, issue of the MMWR (App. A33) were subject to (1) attorney-client privilege, (2) attorney work product privilege and/or, (3) first amendment privileges, including the right to associate and to petition the government (Defendant's Brief in Support of Privileged Documents, App. A98-A119). Sterling also claimed attorney-client and work product privilege in communications with the AFA, a trade association of aspirin manufacturers of which Sterling is a member (*Id*). On May 8, 1987, the parties entered into a Stipulation and Order which was later entered as an order by the trial court. It generally provided that discovery materials could be designated by any party as confidential and were protected against disclosure (App. A8-A11). However, the agreement and order was "without prejudice to the right of any party to bring before the Court at any time the question of whether any particular

information is confidential and/or proprietary" (App. A10).[2]

Trial Court Orders

On January 4, 1988, the trial judge ordered Sterling to describe the categories of documents claimed to be privileged (App. A18-A19). Respondents, if they did not agree that those categories of documents were privileged, were to demand the documents be submitted to the court for *in camera* inspection (App. A18). Sterling complied with the court's order and filed a list of categories of documents claimed to be privileged (App. A55-A56). An *in camera* inspection was scheduled for June 17, 1988. Before the inspection was conducted, the judge recused himself at plaintiffs' request, and the *in camera* inspection was rescheduled for July 20, 1988.

On July 20, 1988, the new judge, without inspecting the documents, ordered petitioner to turn them over to respondents' counsel for review. (App. A22-A23). After review, respondents' counsel was to inform the court which documents were concededly privileged and which documents were in dispute (App. A22-A23). Petitioner filed a motion for reconsideration on the grounds, *inter alia*, that a judicial determination of privilege should be made *before* any documents could be viewed by respondents' counsel.

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[2] It must be noted that plaintiffs have since moved to vacate that protective order. Although the court below has not yet done so, its willingness to lift the protective order in the future was presaged by its now-rescinded order of July 20, 1988, directing, at plaintiffs' request, defendant to seek the lifting in other cases of similar protective orders which defendant had originally sought.

The trial court granted petitioner's motion for reconsideration and vacated its prior order. Still in possession of the documents, the court reviewed them and, on November 10, 1988, issued a written decision denying the majority of Sterling's claims of privilege, and ruled that certain specified documents be turned over directly to plaintiffs' counsel by the court on November 28, 1988 (App. A54).

Appeals in the Wisconsin Courts

Sterling petitioned the Wisconsin Court of Appeals for leave to appeal the court's order of November 10, 1988. The AFA requested permission to intervene in the petition for leave to appeal. On December 14, 1988, AFA's petition to intervene was granted; however, both Sterling's petition for leave to appeal and AFA's petition for a supervisory writ were denied. (App. A24-A27.) A petition for a supervisory writ was filed with the Wisconsin Supreme Court by petitioner. The AFA filed a petition for review. The Wisconsin Supreme Court denied the petitions on February 1, 1989 (App. A28-A31).

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION.

When the CDC suggested that aspirin, probably the most commonly ingested pharmaceutical product in United States history, might be associated with a rare, but serious set of symptoms known as Reye's Syndrome, petitioner and other manufacturers of aspirin confronted the inevitable: years of regulatory and product liability litigation.

The manufacturers' freedom to associate with one another for the common defense of their product and petitioner's right to communicate internally for the purpose of petitioning the government are protected by the first amendment to the United States Constitution. The trial court, however, denied that the first amendment protected petitioner from disclosing documents to respondents. As a result, respondents in this case and elsewhere will have wholesale access to all communications between manufacturers and all documents used as part of petitioner's efforts to petition the government for a redress of grievances and defend itself in court.

II.

SUPREME COURT REVIEW WILL DEFINE THE ASSOCIATIONAL RIGHTS OF CORPORATIONS AND REQUIRE A BALANCING OF THOSE RIGHTS WITH APPROPRIATE GOVERNMENTAL INTERESTS.

> "[I]n no country in the world has the principle of association been more successfully used, or applied to a greater multitude of objects than in America. Besides the permanent associations, which are established by law, under the names of townships, cities and counties, a vast number of others are formed and maintained by the agency of private individuals. . .
>
> "[I]n the United States, associations are established for the public safety, commerce, industry, morality and religion. There is no end which the human will despairs of attaining through the combined powers of individuals united into a society." A. deTocqueville, *Democracy in America* (Heffner, Ed., Signet, 1956).

There is a dearth of case law on the first amendment rights of corporations to associate with one another. However, this Court has extended first amendment protection to corporations generally. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1970). Also, this Court has recognized that the first amendment protects commercial and professional associations. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

The level of first amendment protection afforded to corporate association raises issues of national import. In our complex commercial and legal culture, a challenge to the safety, effectiveness, or inherent value of a nationally-distributed product raises issues of common concern to its manufacturers. When these manufacturers form associations to promote and defend their mutual interests, internal affairs of the associations become affected with first amendment interests. The extent to which association members are entitled to maintain confidentiality in their communications depends entirely on where the line is drawn between their associational rights and compelling governmental interest in frank and open communication between industry and regulatory agencies, on the one hand, and governmental interests in open discovery in civil litigation, on the other hand.

A decision from this Court would provide guidance to lower courts, as did *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). One reason that case arose is the *Federal Rules of Civil Procedure*'s failure to draw a line between a litigant's constitutional right to disseminate information and governmental interests reflected in Rule 26(c), which allows trial courts to enter protective orders limiting dissemination of information produced in civil discovery. Similarly, federal rules are

necessarily imprecise with respect to balancing of interests between the rights of litigants opposing discovery on constitutional grounds and governmental interests, countervailing or otherwise.

The affidavit of Bruce Dickson, general counsel for the AFA, demonstrates that one of the purposes of the Foundation was for manufacturers of aspirin, such as petitioner, to associate for the common purpose of promoting the aspirin industry (App. A83-A96). The common interests of Foundation members crystallized following the suggestion that aspirin, when taken to relieve common symptoms such as pain and fever, might be associated with Reye's Syndrome.

The Foundation was actively involved in preparation for the common defense of its members in regulatory and product liability actions. Many confidential communications between its officers and directors, Dickson, and officers and employees of individual members took place subsequent to CDC's suggestion of a relation between aspirin and Reye's Syndrome (App. A85-A96). These conversations were often memorialized in minutes, memoranda, and other documents. No persons outside the AFA were involved in the conversations, except consultants specifically hired by the AFA to assess relevant information (App. A91-A92).[3] The trial court failed to recognize the most basic

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[3] Many documents of which discovery was sought embodied confidential communications between defendant and academicians; e.g., regarding theretofore unpublished or unfinished work. Plaintiffs never denied the undisputed fact that they had full access to the actual data and information relating to those studies and eventual publications. In effect, plaintiffs wanted more than data, they wanted to know what defendants thought of the data. Allowing

associational freedom in these confidential communications.

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such discovery would create hardships on industry, the scientific and academic community, and, indeed, the government and public at large.

The free flow of ideas within the academic community would be killed. Academic freedom has long been viewed as a special concern of the first amendment. It is at the heart of higher education and comes within the first amendment's protections. Therefore, judicially authorized intrusions must be limited for compelling reasons. *Dow Chemical Co. v. Allin*, 667 F.2d 1262, 1274 (7th Cir. 1982). Researchers must be able to conduct their activities without fear that fruits of their labors may be appropriated or scrutinized by biased third parties, whose interests are antithetical to the researchers'. Otherwise, the contrary realization might well be both unnerving and discouraging, jeopardizing both the studies and careers of academicians. See *Dietchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561, 562 (7th Cir. 1984).

In a very real sense, communication with academicians is very similar to the interest protected by the attorney work product privilege. It is in the best interest of the government and public at large to enable industry to have free and unfettered discussions with the academic community, exchange ideas, and generally further scientific knowledge. In so doing, not only would the state of the art be advanced, but so would the safety and well being of the community. As with an attorney who fears his work product might be later discovered by his opponent, industry would be loathe to openly communicate with academicians, if it were known that their words could be twisted and their embryonic ideas early in research used against them.

The need for protection of these documents from disclosure is underscored by the fact that the trial court, itself, recognized that absolutely no need had been shown for these or any other documents sought by plaintiffs. As the court stated, "plaintiffs have not shown anything other than a generalized need for the documents. No showing or substantial need or undue hardship has been made." (App. A37.)

This Court must balance the infringement upon the freedom of association against countervailing governmental interest. *Shelton v. Tucker*, 364 U.S. 479 (1960). In the instant case, the balancing of interests favors first amendment protection against disclosure. As the trial court correctly held, there is no compelling need for disclosure (App. A37). The most basic analysis of the facts supports this conclusion.

The parties in this case have one central objective: to prove or disprove the existence and nature of a relationship between aspirin and Reye's Syndrome. The parties have equal access to the basic data from which the CDC and governmental agencies originally suggested that there was a relationship. Both parties are privy to conclusions of those who assessed the data. What respondents want from petitioner are the conclusions, thought processes, and strategies of the Foundation, petitioner, and other manufacturers regarding the meaning and sufficiency of data supporting the initial suggestion of a relationship between aspirin and Reye's Syndrome. In short, respondents want to know what the other side *thinks* of the evidence.

Respondents' need for this information has nothing to do with obtaining evidence to establish a connection between aspirin and Reye's Syndrome. They do not want data or other information to support their claim. They only want to know what has been *said* by petitioner and AFA *about* the information and how this can be used to damage any position taken by Sterling at trial. Presumably, the case will rise or fall on the evidence, not what petitioner or AFA thinks about the evidence.

The burden on associational freedom from this intrusion is obvious. The spectre of disclosure limits the right of association members to do just that—associate. They cannot speak freely for fear that every word can be used against them at some later date, irrespective of respondents' lack of need for the information.

Moreover, there is damage to associational freedom by intervention alone. It does not matter that intrusion into a trade association might be less offensive to the first amendment than an intrusion upon political or social organizations. It is still an intrusion and, as the trial court found, there is no need for it in this case. At the very least, the first amendment protects associations against disclosure simply for disclosure's sake.

III.

PETITIONER'S PREPARATION FOR REGULATORY LITIGATION IS PROTECTED BY THE FIRST AMENDMENT.

A. THE INSTANT CASE WILL DEFINE THE PARAMETERS OF THE *"NOERR-PENNINGTON"* PRIVILEGE FOR LOWER COURTS THROUGHOUT THE COUNTRY.

Regulatory litigation before governmental agencies is one form of petitioning the government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971). Allowing respondents access to petitioner's files relating to litigation before

the Food and Drug Administration suffocates petitioner's right to petition the government freely and forcefully.

The right to petition the government, like other first amendment rights, requires a certain amount of "breathing space." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). A party petitioning the government cannot operate effectively in the arena of regulatory litigation, unless it is free to speculate, hypothesize, critique, and generally engage in exhaustive introspection (including engaging in such activities with other manufacturers, experts, and academicians), so its petitioning activity reflects its true position. The right to petition will be seriously hampered if first amendment protection of petitioning activity does not extend to the open interchange necessary to the internal, preparatory process.

The trial court's error in this case is manifest. Rather than examining the consequences to petitioner's first amendment rights from allowing discovery of petitioning documents, the court summarily wrote the argument off as "not recognized in Wisconsin" and "not an attempt to impose liability on [petitioner] for its lobbying and petitioning activities" (App. A53). The court ignored Wisconsin law, which expressly recognizes privileges based upon federal constitutional rights. Wis. Stat. §905.01. Moreover, there is no doubt that respondents will try to use the information sought in their attempt to impose liability upon petitioner. Whether that liability is technically based upon petitioning activity, itself, is the paradigm of a distinction without a difference. The chilling effect of the discovery is the same either way.

The insensitivity of the trial court to federal constitutional issues arising out of petitioner's claim of

first amendment privilege is reason enough to accept this case for certiorari. Courts across the country supervise discovery in cases of this complexity and magnitude every day. Each jurisdiction's courts operate under a different set of procedural rules; consequently, different levels of governmental interest in the discovery process are manifested. A decision which clearly spells out applicability of the first amendment to discovery procedures and balances these protections and governmental interests against any countervailing governmental interests in open discovery will greatly benefit all trial courts, both state and federal.

B. *NOERR-PENNINGTON* PROTECTION FOR PETITIONING ACTIVITY MUST EXTEND TO COMMUNICATIONS PREPARATORY TO THE ACTUAL PETITION.

The *Noerr-Pennington* doctrine, in its ordinary context, protects businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts. *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. den.* 467 U.S. 1210 (1984). The policy underlying the *Noerr-Pennington* doctrine is to preserve the first amendment right to petition government officers and encourage a free flow of ideas to political bodies to ensure intelligent decision-making. *Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md.*, 756 F.2d 1986 (4th Cir. 1985).

Confidentiality of documents prepared by petitioner as part of its case before the FDA is a logical extension of principles and policies underlying first amendment protection of petitioning activity. The expectation of confidentiality in intracorporate communications is

essential to generating a free flow of ideas to the government. Without assurance that petitioner's theories, proposals, and hypotheses will not find their way to an adverse litigant, petitioner's employees and consultants cannot effectively present ideas to each other and, consequently, to the government. Without confidentiality, intracorporate speech will be reduced to bland disclaimers or pure sloganeering. Otherwise, petitioner could not avoid making statements which could be used against it in subsequent litigation. For example, no manufacturer would dare oppose any proposed regulation or deny any defect its product was alleged to have, for fear of being later accused of fraudulent concealment. On the other hand, if a defect was admitted, the eventual use of the admission is obvious. No manufacturer, therefore, could afford to ever take, advocate, or petition in support of any substantive position at all.

The right to petition the government for redress of grievances, established before the Industrial Revolution and dawn of the modern manufacturing corporation, must be flexible enough to allow for changing social and economic structures. The corporate citizen does not petition the government in the same fashion as a disgruntled individual or private political group. The final petition submitted to the government is often the result of a Byzantine decision-making process. This process involves numerous sources of input, each contributing in its own way to the final product.

The corporate petitioner should not, however, be deprived of the same right to free and open exchange of ideas with its government, merely because its process for arriving at its collective "idea" involves multiple formative stages. It is the hallmark of the Bill of Rights

that broad and general concepts enunciated therein can be translated to modern institutions. Moreover, governmental regulatory agencies have a compelling interest in continuing the free flow of frank communication with the entities regulated. If that communication is chilled, efficient functioning of regulatory agencies will be impaired, and interests of the public at large will be jeopardized. Therefore, this case also presents the issue of the balance of the government's need to know versus the individual plaintiff's desire to know.

C. THE LOWER COURTS HAVE HELD THE *NOERR-PENNINGTON* DOCTRINE APPLICABLE TO CIVIL DISCOVERY DISPUTES.

Several lower courts have held that there can be no discovery of documents relating to a party's petitioning activities with the government. *In Re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987); *Australia/ Eastern/ USA v. United States*, 537 F.Supp. 807 (D.D.C. 1982); *Britt v. Superior Court*, 20 Cal.2d 844, 574 P.2d 766, 143 Cal.Rptr 695 (1978).

The question of balancing first amendment rights to petition with perceived needs of civil discovery was addressed squarely in *Burlington*. There, a pipeline company brought an anti-trust action against various railroad companies, contending that the railroads conspired to prevent construction of a national coal pipeline by filing and defending easement litigation. The district court held that the pipeline company could discover documents related to these lawsuits. The fifth circuit reversed, holding that documents prepared by the railroads in connection with lawsuits against the pipeline company were protected from discovery,

because they constituted a legitimate, good faith effort to petition the government. In so holding, the Court of Appeals stated "[T]he district court erred in ordering discovery without considering whether the specific litigation activities were illegitimate" in the sense that such activities were in and of themselves anti-competitive activity. 822 F.2d at 525. The court added that "[T]o permit discovery of the documents withheld in this case as the basis of a larger conspiracy by the railroads would undermine the effectiveness of the very type of petitioning the Supreme Court's decisions had protected." 822 F.2d at 525.

In *Australia/Eastern/USA*, the district court concluded that, in instances of government petitioning, "the first amendment should be balanced against the need for disclosure." 537 F.Supp. at 811. This Court ultimately decided discovery was permissible, but only because the petitioning activities involved foreign governments (*Noerr-Pennington* applies only to petitioning activities made to U.S. government officials).[4] The case thus stands for the proposition that any need for discovery of petitioning activity must be carefully balanced against the possibility that discovery would chill a party's first amendment right to petition the government. As such, *Australia/Eastern/USA* is consistent with the fifth circuit's opinion in *Burlington*.

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[4] Implicit in this holding is that more is at stake than first amendment rights of a party. If only first amendment rights were at stake, then it would not matter whether the communication had been with the United States government or any other nation's government. Therefore, this holding stands for the proposition that, in addition to the party's first amendment rights, the federal government has a compelling interest in insuring that full and frank discussions take place between regulatory agencies and the entities which they regulate.

The Supreme Court of California also has barred discovery of petitioning activity. In *Britt v. Superior Court*, 20 Cal.3d 844, 574 P.2d 766, 143 Cal.Rptr. 695 (1978), a personal injury case arising out of the proximity of a public airport, the court reversed a discovery order which required plaintiff to answer certain deposition questions concerning his participation in organizations which had petitioned the government regarding the airport's operations. The court held that the chilling effect such discovery would have on first amendment petitioning activities outweighed the truth-finding policy underlying discovery. The California Supreme Court further stated:

> "Indeed, in some respects, the threat to first amendment rights may be more severe in a discovery contest, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." 20 Cal.3d at 857, 574 P.2d at 774, 143 Cal.Rptr at 703.

Research has revealed no reported case which has dealt squarely with the issues raised by this petition. Nevertheless, it is apparent from the foregoing cases that first amendment concerns have been and will continue to be addressed in this context. A decision by this Court will aid greatly in resolving future controversies.

IV.

THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH CONSTITUTIONAL BOUNDARIES FOR THOUSANDS OF MULTIPARTY PRODUCT LIABILITY SUITS CURRENTLY PENDING.

Although this Court has expounded upon first amendment privileges against civil discovery in other contexts (*e.g., Herbert v. Lando*, 441 U.S. 155 (1979)), it has never discussed the balance between the governmental interest in open discovery and corporate freedom to associate and petition the government. Recent trends suggest that this issue is certain to recur.

Courts are inundated with so-called mass product liability cases. This phrase describes multiple lawsuits arising out of mass distribution of a single product which allegedly causes injury or illness in a fairly uniform manner. Among better-known examples of such products are asbestos, "Agent Orange," DES, and Bendectin.

The pharmaceutical industry is particularly susceptible to such litigation. Its products are designed to alter body chemistry in a more or less uniform manner to achieve a particular result. By their nature, all such medications have side effects; nonexistent or idiosyncratic side effects are easy to allege and difficult to disprove. Thus, if a widely-distributed pharmaceutical product is alleged to affect users in an unanticipated manner, many lawsuits will inevitably follow.

Vulnerability of the pharmaceutical industry to allegations of harmful side effects has been demonstrated in recent cases involving Bendectin, a drug prescribed from 1957-1983 for pregnant women experiencing

morning sickness. *Richardson v. Richardson Merrell, Inc.*, 857 F.2d 823, 824 (D. C. Cir. 1988). Following allegations that Bendectin caused children to be born with various birth defects, over 1,500 lawsuits were filed against various related corporate entities. 857 F.2d at 824. Consequently, Bendectin was taken off the market in 1983. *Lynch v. Merrell National Lab., Inc.*, 830 F.2d 1190, 1191 (1st Cir. 1988). Ironically, several U. S. Courts of Appeals have recently affirmed jury verdicts and judgments notwithstanding the verdict in which it was found that Bendectin *does not* cause birth defects. *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988); *Lynch*, 830 F.2d at 1191; *Richardson*, 857 F.2d at 824. Nevertheless, incredible costs of national litigation and insurance forced Bendectin from the market. *Brown v. Superior Court*, 44 Cal.3d 1049, 1064 (1988).

When the manufacturer of a pharmaceutical product receives information and studies suggesting an association between its product and a rare onset of symptoms, two events become inevitable. First, there will be regulatory litigation before the FDA. Second, someone who has contracted symptoms described in the studies will sue one, some, or all product manufacturers.

An equally inevitable incident of mass litigation is that plaintiffs' counsel will request production of as many internal documents relating to the allegedly dangerous product as courts will allow. They will argue that the documents could possibly lead to admissible evidence on issues such as knowledge of danger, foreseeability of risk, and alternative composition.

Conflict between the government's and manufacturers' interests in free and open manufacturer-government

communication to facilitate proper regulation, and open intermanufacturer and intracorporate communication to facilitate common defense of their product, on the one hand, and the governmental interest in open discovery on the other hand, raises two issues, resolution of which will provide guidance to all lower courts:

> 1. Does a corporation, through its employees and agents, have a right to associate and speak freely with other corporations and its own employees and agents without fear these communications will be turned over to its legal adversary?
>
> 2. How should courts balance conflicting values underlying these first amendment interests, governmental interest in open communication with regulated entities, and the interest in open discovery?

Lower courts will benefit greatly from an opinion defining the level of confidentiality afforded by the first amendment in this context. First amendment protection varies with the identity of the party claiming the protection (*Minneapolis Star v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (taxes on print and ink used by newspaper publishers are unconstitutional)), the nature of the speech (*Central Hudson Gas and El. Corp. v. Public Service Comm.*, 447 U.S. 557 (1986) (distinguishing levels of protection between commercial and political speech)), and the nature of the restraint or disclosure sought (*Near v. Minn.*, 283 U.S. 697 (1931) (distinguishing prior restraint and subsequent regulation)). Consequently, an opinion from this Court regarding the level of confidentiality afforded these communications will provide invaluable assistance to

lower courts in balancing manufacturers' first amendment rights and governmental interests.

There will always be *some* degree of governmental interest in open discovery of a manufacturer's internal documents. What is not certain, however, is how this interest compares to the manufacturer's first amendment interests and other governmental needs. Resolution of this issue will guide lower courts in determining what kind of showing of particularized need will be necessary to overcome these first amendment interests.[5]

V.

CONCLUSION.

For these various reasons, this petition for a writ of certiorari should be granted. Petitioner reiterates that, if this Court does not accept this matter for review, then important federal questions, as well as public

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[5] Of course, as previously established, *no* showing of *any* need at all was made here.

interest in maintaining confidentiality of communications between the attorney/client, as well as an attorney's work product, will be harmed.[6]

Respectfully submitted,

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[6] Moreover, the trial court's holding that work product privileges attach only to materials in currently ongoing cases, removing such protections once a case is resolved, does impermissible mischief to first amendment and attorney work product privilege guarantees. Surely, the premise, justification, and need for work product protection does not disappear when a case is resolved, especially in the mass litigation context. Furthermore, although on its face the sixth amendment applies only in criminal proceedings, its spirit and guarantees should be applied in civil litigation where, as here, one is threatened with denial of privileges essential to continued effective representation of counsel. Otherwise, counsel's industry and effectiveness will be chilled, realities of continued mass litigation will be ignored, and quasi-criminal penalties (such as punitive damages, here) can be imposed upon a one who is denied effective counsel.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 17, 1989, I served the within *Petition for a Writ of Certiorari to the Supreme Court of Wisconsin or, Alternatively, for Writ of Mandamus* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 17, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)